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Integrated Executive Summary

Report of Consultations

on

A Results-Based
Forest and Range Practices Regime
for British Columbia

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In its New Era document, the Government of British Columbia promised to "Streamline the Forest Practices Code to establish a workable, results-based Code, with tough penalties for non-compliance." The government introduced a discussion paper, *A Results-Based Forest and Range Practices Regime for British Columbia,* on May 1, 2002. The government established a three-part public consultation process:

- A panel of Members of the Legislative Assembly, chaired by North Island MLA Rod Visser;
- A more technical, stakeholder process directed by George Hoberg, Head of the Department of Forest Resources Management at UBC; and,
- A web-based public comment forum, managed by Professor Hoberg.

The public comment period ran from May 1 to June 30, 2002.

This integrated executive summary draws together the main themes of all streams of the consultation process, organized around the objectives the government set for itself when it introduced its proposal. It also provides recommendations.

The discussion paper lays out the government's eight objectives guiding the proposal:

- reducing the transactional and operational costs to industry;
- reducing the Code's complexity;
- providing the forest industry "freedom to manage" in delivery of defined results;
- maintaining the Code's high environmental standards;
- continuing to balance social, environmental and economic interests;
- maintaining and enhancing the level of public acceptance of forest management;
- consistency with the resource capacity of government: and,
- strengthening the compliance and enforcement regime.

The discussion paper attracted a significant amount of comment. The MLA panel held 13 full day meetings in locations throughout the province, hearing approximately 250 oral presentations. The stakeholder process included meetings with 58 groups and individuals, and 133 written submissions. The discussion forum on the website attracted 170 registered users, and 272 entries were posted.

All streams of the public consultation process revealed that there is quite a high level of discontent about the proposal for a results-based code laid out in the discussion paper. For the most part, there is little agreement across different categories of stakeholders about why the proposal is flawed. For example, industry groups and some community groups are

sharply critical of the proposal because they believe it still contains too many prescriptive rules, and they do not believe it will reduce costs. Environmental groups, First Nations, and some community groups are also sharply critical, but for the opposite reason. They believe the proposal weakens environmental standards and gives too much control to the industry. Woodlot owners, trappers, ranchers, and recreationalists also were strongly critical.

Objective 1: **Reducing the transactional and operational costs to industry**

There is a clear consensus among industry that this objective has not been met. Many industry representatives stated that the results-based code proposal would not reduce costs, and when combined with other changes to forest policy in the province, it would likely lead to increased costs. The simplification of legal planning requirements does arguably reduce transaction costs, but there was little acknowledgment by industry that this objective was met.

It may have been unreasonable to believe that a new results-based code could significantly reduce industry costs without compromising environmental standards. While we know too little about the costs of the Code, the planning and administration aspects of the Code – which a shift to a results-based framework would presumably address – have never been a significant cost driver for industry.

Special concerns about the costs of planning were raised by small licensees, particularly woodlots owners, and some ranchers. The proposed results-based code does provide for special treatment for these two groups, but their representatives believe the system is still unworkable for their special needs.

Recommendations

The government should work with industry to perform an analysis of the cost implications of the proposed results-based code, and create an efficient and effective system for monitoring the costs of implementing the results-based code.

The government should consider creating a more distinctive regulatory regime for woodlots and range tenures to account for their unique character.

Objective 2: **Reducing the Code's complexity**

The proposed results-based code would reduce the complexity of the regulatory framework. When the Code was introduced in 1995 there were, according to government figures, approximately 1245 regulatory requirements (in terms of number of planning requirements, rules and results that needed to be met). The "streamlining the Code" initiative of the late 1990s reduced that number to about 1050. The government estimates that the proposed results-based code would significantly reduce the number of regulatory requirements to about 332 – a 70% reduction from the existing Code.

Perhaps the biggest change is in planning requirements. The existing Code requires licensees to prepare, for government approval, a Forest Development Plan and various site plans. The proposed results-based code only requires submission and approval of a Resource Development Permit, and removes requirements for site plans.

The Forest Practices Code had provisions (until very recently) for joint approval of Forest Development Plans, and still requires joint decisions for some exemptions. The proposed results-based code would provide for a single statutory decision maker for all such approvals and decisions.

Industry believes the proposed framework is still too complex. Industry is very concerned about the overlapping and uncertain relationships between the three agencies involved in implementing the results-based code. While joint decision-making would be eliminated, new elements of complexity are created by introducing a third agency, and by not making the allocation of responsibilities, and mechanisms for coordination, among the three agencies clear. The proposed changes in the planning framework have created considerable uncertainty for industry, creating anxieties about requirements and responsibilities, and tempering the perception that the proposal embodies a significant reduction in complexity.

Recommendations

The government should consider simplifying its organizational arrangements for delivering the results-based code and, at a minimum, ensure that the roles and responsibilities of all government agencies are precisely defined to eliminate ambiguity and ensure smooth, orderly implementation.

The government should ensure that the legislative framework promotes consistent interpretation and application by implementing officials.

Objective 3: **Providing the forest industry "freedom to manage" in delivery of defined results**

The philosophy of a results-based regulatory framework is that the government should clearly set the objectives or results that should be achieved, and that industry should be given freedom in how to meet those results. By significantly reducing the number of planning requirements and prescriptive rules, the industry should have more "freedom to manage" to achieve defined results than the current Code provides.

Industry does not believe the proposed results-based code would provide them with sufficient flexibility to manage effectively. Many industry respondents were very critical of the framework for continuing to rely on a number of prescriptive, "one size fits all" rules, and for not allowing sufficient flexibility in the resource development permit process. They propose to have results and rules developed by licensees themselves in the plans they submit to government, so that they can be tailored to meet local ecological, economics, and social conditions. Industry would also prefer to have the planning framework better coordinated with certification and related sustainable forest management planning initiatives.

Environmentalists are generally not supportive of this objective. They are very concerned about the government turning too much responsibility for managing the forest to companies and professionals. Environmental groups are strongly opposed to having industry "write their own rules," and prefer instead to find ways to strengthen generally applicable results and rules to protect environmental values.

Recommendations

The government should review contested result statements to ensure that they are sufficiently clear, measurable, and enforceable.

The government should consider increasing the flexibility of the framework by creating an option whereby licensees can opt out of parts of the general regulatory framework, but only if they can demonstrate a commitment to criteria and indicators of sustainable forest management that will meet or beat the environmental standards in the regulatory framework.

The government should clarify the evidentiary burden required to meet the Resource Development Permit tests.

The government should consider revising the Resource Development Permit to provide for minor amendments and "gating."

While encouraging licensees to do as much as feasible to resolve potential conflicts before submitting Resource Development Permits, the government should clearly acknowledge its role as the ultimate authority in resolving conflicts in cases of overlapping resource claims.

Objective 4: **Maintaining the Code's high environmental standards**

Environmentalists believe the proposed results-based code would threaten environmental standards they view as already too weak. They believe the existing Code has failed to achieve its environmental objectives for several reasons. First, landscape level planning, the main vehicle for the protection of biodiversity, has only been implemented in several places in the province. Second, they believe the pursuit of environmental goals has been limited by the timber supply impact caps placed on Code implementation. In the view of environmentalists, the proposed results-based code would further weaken environmental standards, by:

- reducing government oversight of industry by severely limiting operational planning requirements and eliminating site level plans;
- increasing the importance of enforcement while government resources for enforcement are declining;
- relying on standards that are not measurable, auditable, or enforceable; and,
- allowing many exemptions to objectives, rules, and results.

Industry believes that many of the results and rules proposed by the government "would be worse for industry than the existing Code," in that they would be more restrictive or costly to apply. Industry's characterization is dramatically at odds with the criticisms of environmental groups that the results-based approach threatens environmental values because it reduces government oversight and delegates too much responsibility to industry.

Recommendations

The government should review the proposed regimes for environmental values and ensure that, at a minimum, they maintain existing environmental standards.

The government should, in collaboration with the expert community, co-operatively develop an effectiveness, evaluation, and monitoring framework for all code values, and report publicly on the results of those evaluations.

The government should conduct, in collaboration with the expert community, a scientific review of the biodiversity guidelines and the results and rules for riparian protection.

Ideally, these reviews would occur prior to the introduction of any new code. If that is not feasible, the framework should be designed to easily accommodate the results of the reviews.

The government should put in place legally binding interim biodiversity objectives prior to the implementation of the new code. The interim objectives should be subjected to a public consultation process before they are brought in to force. To the extent feasible, this should be coordinated with the recommended scientific review of the biodiversity objectives.

Objective 5: **Continuing to balance social, environmental and economic interests**

Finding the right balance between environmental, social, and economic objectives is the most difficult challenge in designing the results based code. Perhaps the biggest gap revealed during the consultation process was the sharp differences of opinion on which of these three interests should be emphasized, and how the balance between them should be drawn when they come into conflict. Many rural communities and industry groups are particularly concerned that socio-economic objectives are not adequately reflected in the proposed new regime. Many believe that timber is treated as a residual value after other objectives have been provided for. They would like to see clear timber targets built into land use objectives.

In contrast, environmental groups are extremely concerned about how socio-economic objectives will constrain environmental objectives. Rather than seeing timber as a residual, they believe current policy, and the results-based code proposal, give priority to timber and treat environmental values as residual. They are particularly opposed to the proposal to continue to limit the impacts of the code on timber supply to 6%. Environmentalists emphasize how constraining these timber supply impact caps have been to implementing important elements of the code, especially the biodiversity provisions. They want timber supply impact caps eliminated. In addition, they would like to see ecosystem-based forest management adopted as an overarching objective. They prefer an approach to forest planning where practices are designed to ensure environmental values are protected, and timber harvest levels are calculated as a residual.

Recommendations

The government should conduct an open reconsideration of the policy to limit the impact of the Code on timber supply to 6%. The analysis should include an assessment of how much the Code has constrained timber supply thus far, and what impact the policy has had on the Code's ability to protect environmental values.

The government should establish clear timelines, and provide strategic direction and adequate resources to the land use processes that guide forestry operations to ensure that they are completed in a timely manner.

Objective 6: **Maintaining and enhancing the level of public acceptance of forest management**

Public acceptance of forest management is determined by a number of things, including how well the public thinks the values they care about in the forest are being protected. Building confidence that public values are protected requires adequate information about forest activities and their consequences, and that the government and licensees consult with the public on land use objectives and proposed resource development. Under the proposed results-based code, licensees have a legislated requirement to consult with the public and consider public comments on the RDP. Licensees will be expected to describe their public consultation efforts in the evidence submitted to the district manager to support authorization of the RDP, although the methods licensees use to gather and consider public input and the evidentiary basis for RDP approval are not legislated. There are no rules or results under the proposed code to guide public consultation.

This approach is a departure from the many specific procedural requirements under the existing Code for public review and comment, and environmental stakeholders recommended that the proposed code be revised to include results for achieving adequate, effective public consultation.

A further significant concern among both industry and environmental stakeholders was the fact that RDPs do not specify the locations of cutblocks and roads, or include any other site-specific information or assessments. Without this information, many respondents felt that the public and First Nations would have insufficient information to adequately assess whether RDPs could result in impacts to their specific resource uses, cultural values, or interests. This was considered a significant drawback in the proposed code, and a broad cross-section of presenters recommended that site-specific information and plans be provided to the public so that their input is well-informed.

Recommendations

The government should clarify and define public consultation objectives and processes for the results-based code.

The government should restore site levels plans to the framework. While there should not be a requirement for government approval, their content could be specified, they could be

made public, and consideration should be given to whether they should be binding on licensees.

The government should ensure that appropriate requirements for professional regulation are contained in legislation for all professionals involved in delivery of the code.

Objective 7: **Consistency with the resource capacity of government**

Many of the changes proposed in the discussion paper are intended to deliver a results based code with fewer government resources than the existing framework. Perhaps the most important change is the simplification of planning requirements, especially the elimination of approved site plans, which will result in far less staff time being absorbed by review and approvals.

There was not much discussion during the public consultation process about whether the proposed results-based code would be consistent with the resource capacity of government. There was a significant amount of concern among environmentalists and others about whether the level of resources the government has allocated to forest management and associated activities is adequate to protect the public values in the forest. The government has initiated significant budget cuts for the three ministries involved in the Code. Over the next three years, the number of ministry employees will be reduced by between 31% and 36%.

Objective 8: **Strengthening the compliance and enforcement regime**

Compliance and enforcement is a cornerstone in the government's proposed results-based code. The New Era commitment on revising the Forest Practices Code emphasizes compliance and enforcement – "establish a workable, results-based Code, with tough penalties for non-compliance." The proposed results-based code maintains most of the compliance and enforcement provisions of the existing Code.

Several important changes are proposed. A new statutory power is proposed, permitting the government "to intervene proactively in certain situations where a contravention has not yet occurred." New requirements for notification of commencement, suspension, and cessation of operations, are proposed to facilitate inspection and monitoring.

The most complex issue in the proposed compliance and enforcement regime is the question of whether due diligence should be a defence in cases of administrative penalties. Such a defence would mean "that a

person who causes a contravention of an enactment may be excused for that contravention if that person can demonstrate that they took all reasonable care or "due diligence" to prevent the contravention."[1]

The issue of due diligence is very important, because it influences the incentives of companies and determines the allocation of liability between licensees and the government. The overall thrust of the results-based code proposal is to shift liability from the government to the industry, and reducing the use of a due diligence defence would be consistent with that. But the enforcement regime needs to create the appropriate incentives for industry to avoid contravening the results and rules while simultaneously meeting norms of procedural fairness. The real question is: *who should be responsible when a result or a rule is contravened despite the best efforts of the regulated community?* Providing a due diligence defence would make the government responsible in those circumstances; preventing a due diligence defence would make the industry liable.

There is unanimity within the industry and among professional associations that due diligence should be a complete defence. Licensees and industry lawyers also argue that principles of fairness and natural justice suggest that a due diligence defence should be provided. There is a consensus among environmental groups that due diligence should not be a defence. Environmentalists believe that due diligence has no place in the administrative penalty regime.

Environmentalists are very concerned about the government's capacity for and commitment to effective enforcement. They are concerned about how staff cuts will affect enforcement. They also argue that because of the absence of clear, measurable results in many areas, and because of the reduction in operational planning requirements, enforcement under the results-based code will be more expensive, complex, and difficult.

Industry groups believe that the Code already has a very strong compliance and enforcement framework. They would like to see the framework streamlined by eliminating administrative penalties. They also believe that more positive incentives to promote compliance should be built in, for example, by giving credit to companies that have achieved certification.

Recommendations

The government should ensure sufficient resources are deployed to enforce the code properly.

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[1] Garry Mancell, Submission to MLA Committee, p. 1.

The government should consider the certification status of companies when developing compliance and monitoring and auditing schedules.

First Nations

The concerns raised by First Nations in the process are not adequately captured in the analysis of the eight objectives. In their oral and written submissions, First Nations raise a broad spectrum of concerns with the proposed code, including a number of comments that reflected the range of views expressed by other parties. But there are also a number of concerns that were distinctive to First Nations.

Generally, First Nations express the concern that the proposed results-based code gives inadequate attention to their aboriginal rights and title. Second, they are concerned that the proposed results-based code does not provide adequate mechanisms for consultations, especially in light of recent court cases that they believe expand the consultation duties of the government and licensees. Third, they are concerned about the loss of requirements for site level information in plans. Without site level details, First Nations believe they will not be able to adequately assess what cultural values or rights may be affected.

The cultural heritage resources section of the proposed code is especially relevant to First Nations. Concerns are expressed about the elimination of the requirement for archaeological impact assessments, the limited definition of the types of sites to which the section applies, and the potential for unfavourable changes to the Heritage Conservation Act.

All First Nations that submitted written briefs said they were not adequately consulted regarding the proposed code. They argue that the process did not meet the government's legal and fiduciary obligations of meaningful consultation. Many First Nations felt that they did not have adequate time to respond to the discussion paper. First Nations believe they are entitled to a different, more formal type of consultation, more consistent with a government-to-government relationship.

The development of a results-based code is not the appropriate vehicle to address the extremely complex, challenging issues confronting the province and its relationship to First Nations. Nonetheless, revisions to the Code should not increase the risk of unjustified infringement of aboriginal rights and title, jeopardize recent positive local developments, or create new obstacles to better, more productive relations with First Nations.

Recommendations

The government should conduct additional discussions with First Nations prior to finalizing the results-based code policy decisions.

The government should ensure that adequate information is available to enable First Nations to adequately assess the impacts of proposed development on their cultural values and aboriginal rights and title.

The government should ensure the consistency of the results-based code with any consultation requirements as defined by the Courts.

Conclusion

In addition to the broad range of concerns highlighted above, most respondents felt that the public had insufficient time to comment on the proposed results-based code, and that the absence of land use objectives (or interim objectives) and the lack of clarity in most of the rules and results seriously undermined their ability to provide meaningful input.

The government should be credited for the openness and transparency of this consultation process. In addition, by laying out a specific framework in the discussion paper, the government made clear its intended direction, and provided an effective focus for public deliberation and debate.

However, given the depth and breadth of the concerns expressed throughout the consultation process, the version of the results-based code proposed in the May 1 discussion paper does not adequately meet the objectives established by the government. Further policy development and consultations are necessary before legislation should be introduced.

Recommendation

The government should conduct additional discussions with First Nations and various groups to revise the results-based code proposal. To this end, the government should also work with the forest industry, the ranching sector, the woodlot community, and environmental organizations, and any other parties it deems appropriate.

Summary List of Recommendations

Before policy decisions are finalized for the results-based code, the government should consider the following recommendations:

1. The government should conduct an open reconsideration of the policy to limit the impact of the Code on timber supply to 6%. The analysis should include an assessment of how much the Code has constrained timber supply thus far, and what impact the policy has had on the Code's ability to protect environmental values.

2. The government should review the proposed regimes for environmental values and ensure that, at a minimum, they maintain existing environmental standards.

3. The government should, in collaboration with the expert community, co-operatively develop an effectiveness, evaluation, and monitoring framework for all code values, and report publicly on the results of those evaluations.

4. The government should conduct, in collaboration with the expert community, a scientific review of the biodiversity guidelines and results and rules for riparian protection. Ideally, these reviews would occur prior to the introduction of any new code. If that is not feasible, the framework should be designed to easily accommodate the results of the reviews.

5. The government should work with industry to perform an analysis of the cost implications of the proposed results-based code, and create an efficient and effective system for monitoring the costs of implementing the results-based code.

6. The government should consider creating a more distinctive regulatory regime for woodlots and range tenures to account for their unique character.

7. The government should review contested result statements to ensure that they are sufficiently clear, measurable, and enforceable.

8. The government should consider increasing the flexibility of the framework by creating an option whereby licensees can opt out of parts of the general regulatory framework, but only if they can demonstrate a commitment to criteria and indicators of sustainable forest management that will meet or beat the environmental standards in the regulatory framework.

9. The government should ensure sufficient resources are deployed to enforce the code properly.

10. The government should consider the certification status of companies when developing compliance and monitoring and auditing schedules.

11. The government should consider simplifying its organizational arrangements for delivering the results-based code and, at a minimum, ensure that the roles and responsibilities of all government agencies are precisely defined to eliminate ambiguity and ensure smooth, orderly implementation.

12. The government should ensure that the legislative framework promotes consistent interpretation and application by implementing officials.

13. The government should clarify the evidentiary burden required to meet the Resource Development Permit tests.

14. The government should consider revising the Resource Development Permit to provide for minor amendments and "gating."

15. While encouraging licensees to do as much as feasible to resolve potential conflicts before submitting Resource Development Permits, the government should clearly acknowledge its role as the ultimate authority in resolving conflicts in cases of overlapping resource claims.

16. The government should restore site levels plans to the framework. While there should not be a requirement for government approval, their content could be specified, they could be made public, and consideration should be given to whether they should be binding on licensees.

17. The government should ensure that appropriate requirements for professional regulation are contained in legislation for all professionals involved in delivery of the code.

18. The government should establish clear timelines, and provide strategic direction and adequate resources to the land use processes that guide forestry operations to ensure that they are completed in a timely manner.

19. The government should put in place legally binding interim biodiversity objectives prior to the implementation of the new code. The interim objectives should be subjected to a public consultation process before they are brought in to force. To the extent feasible, this should be coordinated with the recommended scientific review of the biodiversity objectives.

20. The government should clarify and define public consultation objectives and processes for the results-based code.

21. The government should conduct additional discussions with First Nations prior to finalizing the results-based code policy decisions.

22. The government should ensure that adequate information is available to enable First Nations to adequately assess the impacts of proposed development on their cultural values and aboriginal rights and title.

23. The government should ensure the consistency of the results-based code with any consultation requirements as defined by the Courts.

24. The government should conduct additional discussions with First Nations and various groups to revise the results-based code proposal. To this end, the government should also work with the forest industry, the ranching sector, the woodlot community, and environmental organizations, and any other parties it deems appropriate.